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01/10/12

FILED/ACCEPTED

June 25, 2012

JUN 25 2012

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Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
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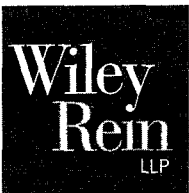
Re: Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator; WC Docket Nos. 08-71 and 06-122, CC Docket Nos. 97-21 and 96-45; USAC Audit No. CR2009CP002

Dear Ms. Dortch:

On behalf of Puerto Rico Telephone Company, Inc. ("PRT"), enclosed for filing in the above-referenced dockets is a Request for Review of Decision of the Universal Service Administrator in response to the November 16, 2011 USAC Internal Audit Division Report on the Audit of Puerto Rico Telephone Company, Inc. 2008 – FCC Form 499-A Rules Compliance. In its request, PRT seeks Commission review of: (1) the decision of the Universal Service Administrative Company ("USAC") to reclassify the jurisdiction of PRT's private line service revenues from intrastate to interstate, and (2) the application by USAC of its "Pay and Dispute Policy" against PRT.

As detailed in the enclosed Request for Confidential Treatment, PRT requests that the Commission treat as confidential parts of the request and supporting exhibits that contain confidential and proprietary information. Accordingly, PRT submits two versions of the request and supporting exhibits: (1) a non-redacted version that contains confidential and proprietary information; and (2) a redacted version for public inspection. PRT requests that the Commission treat the non-redacted version and the accompanying documents confidentially.

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Marlene H. Dortch

June 25, 2012

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Please contact the undersigned with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Navin", written over the printed name.

Thomas J. Navin

Counsel for Puerto Rico Telephone Company, Inc.

Enclosures

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01/15/12

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review by Puerto Rico)	WC Docket No. 08-71
Telephone Company, Inc. of Decision of the)	
Universal Service Administrator)	WC Docket No. 06-122
)	
)	CC Docket No. 97-21
)	
)	CC Docket No. 96-45
)	
)	USAC Audit No. CR2009CP002

**PUERTO RICO TELEPHONE COMPANY, INC.'S REQUEST FOR REVIEW OF
DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR**

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June 25, 2012

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**Before the
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Washington, D.C. 20554**

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**PUERTO RICO TELEPHONE COMPANY, INC.'S REQUEST FOR REVIEW OF
DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR**

I. STATEMENT OF ISSUES AND INTEREST

Puerto Rico Telephone Company, Inc. ("PRT") hereby requests that the Federal Communications Commission ("Commission") reverse in part the Universal Service Administrative Corp.'s ("USAC") findings in the above-captioned audit proceeding.¹ Specifically, the Commission should take the following two actions.

First, the Commission should reverse USAC's decision to reclassify the jurisdiction of PRT's private line service revenues from intrastate to interstate.² As detailed below, USAC's

¹ See Letter from Brandon Ruffley, Universal Service Administrative Company, to Robert Figenschier, Puerto Rico Telephone Company, Inc., Re: "Final USAC Audit Report for Puerto Rico Telephone Company, Inc." (April 25, 2012) ("April 25 Letter"); see also "USAC Internal Audit Division Report on the Audit of Puerto Rico Telephone Company, Inc. 2008 – FCC Form 499-A Rules Compliance," USAC Audit No. CR2009CP002 (Nov. 16, 2011) ("Final Audit Report"). PRT files this Request for Review in accordance with Sections 54.719, 54.721, and 54.722 of the Commission's rules. See 47 C.F.R. §§ 54.719, 54.721, and 54.722.

² USAC made three Findings that increased PRT's USF contribution base to [REDACTED], almost all of which is attributable to USAC's unlawful decision to reclassify [REDACTED] of dollars in revenue as interstate private line service revenue. In Finding 1, USAC reclassified [REDACTED] into the interstate private line category. In Finding 2, USAC reclassified [REDACTED] into the interstate private line category. In Finding 3, USAC reclassified [REDACTED] into the interstate private line category. Footnote continues on next page . . .

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decision—which relies on an impermissible reading of the Commission’s 10% Rule—exceeds the scope of its legal authority, undermines the protections afforded to regulated entities by the Administrative Procedure Act (“APA”), and is poor public policy. USAC’s decision also ignores critical evidence that supports PRT’s classification of the private line revenue in question as intrastate. Specifically, USAC turns a blind eye to the fact that PRT’s customers knowingly purchased the private lines in question from PRT’s intrastate tariff even though the intrastate tariff cost three times as much as the interstate tariff. Any rationale business would have purchased their service from PRT’s interstate tariff if all they needed to do was certify that more than a *de minimis* amount of traffic on the circuit would be interstate.

Notably, PRT’s instant request is just the latest in a series of carrier requests for the Commission to instruct USAC as to the proper application of the 10% Rule.³ The time has come for the Commission to remind USAC that private line circuits purchased from intrastate tariffs are presumed to be jurisdictionally intrastate. Where the carrier has reliable evidence demonstrating more than a *de minimis* amount of interstate usage, such carrier may avail itself of interstate tariffs. USAC should be admonished by the Commission for unilaterally reclassifying private line revenues as interstate.

[REDACTED] into the interstate private line category. In Finding 3, USAC reclassified [REDACTED] into the interstate private line category.

³ See Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (filed April 3, 2012); Request for Review of XO Communication Services, Inc. of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 29, 2010) (“XO Request for Review”); Madison River Communications, LLC Request for Review, WC Docket No. 06-122 (filed Dec. 12, 2008). Presumably, USAC has applied the same reading to other contributor revenue reports in the past several years, and those contributors have stayed silent.

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Second, the Commission should instruct USAC to suspend its “Pay and Dispute Policy” against PRT. USAC’s audit letter demands that PRT file a revised Form 499-A and pay \$7 million while it disputes the lawfulness of USAC’s audit. Although USAC applies this “pay-and-dispute” policy as if it were a Commission rule, the Commission has never adopted that policy, let alone codified the policy as a rule. USAC’s pay-and-dispute policy is unlawful and cannot be enforced against PRT because: (1) USAC lacked authority under FCC rules to adopt the policy in the first place; (2) the policy is a substantive rule that was not adopted pursuant to the notice-and-comment requirements of the APA; and (3) the policy was inadequately noticed.

II. STATEMENT OF FACTS

A. BACKGROUND ON PRT

PRT is an incumbent local exchange carrier and operates as a mobile phone service provider. PRT delivers a comprehensive array of telecommunications solutions to individuals, growing businesses, large enterprises, government customers, information service providers, and other telecommunications carriers. Of relevance to this proceeding, PRT offers government agencies, business customers, and carriers a variety of private line services such as point-to-point dedicated circuits and high-capacity dedicated transport circuits that originate and terminate within Puerto Rico through intrastate and interstate tariffs. And PRT’s customers can purchase these services from either PRT’s intrastate or interstate tariff based on requirements such as the 10% Rule. Of course, to qualify for an interstate tariff, a customer must certify to the interstate use threshold.

Local Private Line or Leased Line services typically provide non-switched point-to-point services on a stand-alone basis to other carriers or as part of a private network. The services are often used by businesses, organizations, institutions, and telecommunications service providers that need to exchange data and other communications traffic between two or more discrete

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locations. Further, the vast majority of local private line circuits classified by PRT as intrastate are geographically intrastate, closed circuits that do not connect to other carrier circuits, customer premises equipment that bridges traffic to other locations, the public switched telephone network (“PSTN”) or the Internet. For these circuits the traffic is, by definition, intrastate. PRT also offers switched dedicated circuits that are used by carriers such as IXC and CLECs for the purpose of carrying switched traffic within and between networks. These circuits may carry both intrastate and interstate traffic and therefore, they may be classified as either intrastate or interstate based on requirements such as the 10% Rule.

B. BACKGROUND ON USAC’S AUDIT OF PRT’S 2008 FORM 499-A

On November 16, 2011, USAC’s Internal Audit Division (“IAD”) released an audit report detailing findings and offering recommendations regarding PRT’s 2008 FCC Form 499-A. The audit’s primary objective—as articulated by USAC—was to determine the accuracy and completeness of PRT’s reported revenues on its 2008 FCC Form 499-A and to identify any potential misstatements that changed PRT’s USF reporting and contribution obligations for the period audited.⁴

IAD concluded—albeit incorrectly—that PRT failed to comply with the Commission’s rules for the period reviewed and that PRT’s revenues were not reported in accordance with the Commission’s rules. Specifically, IAD made three Findings that expanded the contribution base:

- *Products and Jurisdiction.* IAD asserted that PRT’s revenues were not always reported on the correct lines of the Form 499-A and using the most accurate jurisdiction. Included in this Finding was IAD’s conclusion that PRT did not report its private line revenues using the most accurate jurisdiction. Estimated impact on the USF contribution base = [REDACTED] derives from USAC’s erroneous reading of the 10% Rule).⁵

⁴ Final Audit Report at 2.

⁵ *Id.* at 3.

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- *Block 3 Revenue.* IAD asserted that PRT did not maintain necessary documentation to support the classification of its customers as resellers. IAD alleged that PRT could not identify on which 2008 FCC Form 499-A lines it reported its reseller revenue, and was unaware of the proper FCC Form 499-A reporting requirements for its CABS, universal service support, and collocation revenues. Estimated impact on the USF contribution base = [REDACTED] derives from USAC's erroneous reading of the 10% Rule).⁶
- *Non-Telecommunications Revenue.* IAD asserted that PRT incorrectly reported revenue as non-telecommunications revenue. Estimated impact on the USF contribution base = [REDACTED] derives from USAC's erroneous reading of the 10% Rule).⁷

In addition, the IAD audit report stated that after the USAC Board deemed the audit report final, then USAC Financial Operations would notify PRT "that it has 60 days to submit a properly revised 2008 FCC Form 499-A for the period audited that is consistent with the Findings in the audit report."⁸ The report also noted that in the event that PRT "does not submit a revised 2008 FCC Form 499-A, USAC Financial Operations will prepare a 2008 FCC Form

⁶ *Id.* PRT has faith that the Commission will reverse USAC's decision to reclassify the revenues in Finding 2 as interstate private line revenues. Alternatively, the Commission could reverse Finding 2 because USAC misapplied the standard that wholesale carriers must satisfy to classify revenues as reseller revenue in Block 300 of the FCC Form 499-A. As is permitted by the FCC, PRT did not follow the strict confines of the safe harbor verification procedures outlined in the FCC Form 499-A Instructions, and instead relied in part upon "other reliable proof" to demonstrate that the customers in question could reasonably be expected to contribute to the USF. Specifically, PRT determinations regarding the reseller exemption are based on the Annual Fee Waiver Certification Form which is submitted yearly and maintained on PRT's archives. USAC, however, incorrectly suggests that the only acceptable method of verifying a customer's reseller status is to use the process suggested in the Form 499-A Instructions. This patently incorrect assertion of applicable rules colors USAC's entire analysis of PRT's reseller verification procedures. Consequently, the Commission must act to reign in USAC's improper position and affirm that PRT reasonably determined that the resellers at issue were properly classified by PRT.

⁷ *Id.*

⁸ *Id.* at 33.

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499-A for the Carrier based on the findings and will begin invoicing the Carrier for the additional USF contribution amounts owed.”⁹

On November 15 and 18, 2011, PRT submitted formal responses to IAD’s audit report. In the November 15, 2011 letter, PRT made the following rebuttals to IAD’s allegations regarding PRT’s Block 3 revenue and non-telecommunications revenue:

- *Block 3 Adjustments.* The various Block 3 adjustments that produce a potential increase to the contribution base of [REDACTED] are overstated. Even if PRT accepted the IAD determination that [REDACTED] resellers failed to contribute to the USF, it appears that this revenue amount is classifying all or very nearly all such revenues as interstate and international. However, other carriers resell many PRT intrastate services.
- *Non-Telecommunications.* The non-telecommunications finding adjustments produce a potential increase to the contribution base of [REDACTED], which results primarily from the jurisdictional allocation of certain unidentified miscellaneous revenues based on Line 420. If PRT prevails on its contentions regarding Products and Jurisdiction and Block 3, then the IAD determination of the Line 420 interstate percentage should decline.¹⁰

In the November 18, 2011 letter, PRT objected to IAD’s novel interpretation of the 10% Rule on both legal and policy grounds.¹¹ PRT emphasized that the 10% Rule—on its face—does not create the presumption that private lines are interstate unless proven otherwise.¹² PRT also highlighted that PRT’s interstate rates are lower than its intrastate rates, so if anything, PRT’s customers have an incentive to report that they will exceed the 10% mixed use threshold. That PRT’s customers failed to do so strongly suggests that the lines were in fact intrastate.¹³

⁹ *Id.*

¹⁰ See Letter from Robert Figenschers, Puerto Rico Telephone Company, Inc., to Wayne Scott, Universal Service Administrative Company, at 2 (Nov. 15, 2011) (“Nov. 15 Letter”).

¹¹ See Letter from Robert Figenschers, Puerto Rico Telephone Company, Inc., to Wayne Scott, Universal Service Administrative Company (Nov. 18, 2011) (“Nov. 18 Letter”).

¹² *Id.* at 2.

¹³ *Id.*

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In this November 18 letter, PRT also alerted the Commission that it had over 60 MBs of files to support its contentions that it wanted to share with the FCC. But “rather than sending 60 MBs or more of files that could cause great confusion absent explanations,” PRT proposed to coordinate with Colleen Grant of IAD the following week to arrange for the provision of any files and then to provide any appropriate explanations.¹⁴

On April 24, 2012, the USAC Board of Directors approved the final audit report. USAC’s Findings result in an increase of [REDACTED] in the contribution base for the period audited.¹⁵ Based on this amount, USAC claims that PRT owes an additional [REDACTED] in USF contribution obligations for the period audited.¹⁶

On April 25, 2012, USAC Financial Operations sent PRT a letter, notifying PRT of its decision to approve the final audit report and alerting PRT that the carrier has until June 25, 2012 to appeal USAC’s decision with the FCC.¹⁷

On May 2, 2012, USAC sent a letter to PRT regarding the requirement to revise its FCC Form 499-A within 60 days in accordance with IAD’s audit of the contributor revenue filings for the year 2008 audit.

On June 4, 2012, USAC sent PRT a letter informing the company that USAC had not received a revised Form 499-A.¹⁸ USAC reminded PRT that the required FCC Form 499-A

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ April 25 Letter.

¹⁸ See Letter from Chang-Hua Chen, Universal Service Administrative Company, to Ana Maria Betancourt, Puerto Rico Telephone Company, Inc., at 1 (June 4, 2012).

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revisions must be received by USAC no later than 30 days from the date of the letter (July 4, 2012).¹⁹

III. STATEMENT OF LAW—THE 10% RULE

The plain meaning of the 10% Rule, the history underpinning the rule, and Commission precedent interpreting the rule leave no doubt that physically intrastate private line circuits should be classified as intrastate. Only where the purchaser presents evidence (*e.g.*, through a certification) that more than a *de minimis* amount of traffic on the circuit is interstate may the purchaser buy through interstate tariffs. USAC's interpretation to the contrary violates FCC precedent.

A review of the historic jurisdictional treatment of private lines confirms the error of USAC's position. The 10% Rule was adopted in the 1980s as part of the separations process as a means to allocate certain special access or private line costs to the intrastate or the interstate jurisdictions when such facilities carry both intrastate and interstate traffic. Prior to 1989, "the cost of special access lines carrying both state and interstate traffic [was] generally assigned to the *interstate jurisdiction*."²⁰ The problem with this approach, according to the Joint Board appointed to study the issue, was that it "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."²¹ The Joint Board recommended that the Commission adopt separations procedures for private lines—specifically, that such lines be allocated to the interstate jurisdiction only "through customer

¹⁹ *Id.*

²⁰ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, 4 FCC Rcd 1352, ¶ 1 (1989) (emphasis added).

²¹ *Id.*

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certification that each special access line carries more than a *de minimis amount of interstate traffic*.²² Because the only certification mentioned by the Joint Board was to validate whether the line carried *more than* a certain amount of *interstate* traffic, and because the problem the Joint Board sought to solve was excessive interstate allocation, it was clear that the Joint Board recommended that absent certification of *interstate* use, a line should be considered intrastate when the A and Z locations are in the same state.

The Commission adopted the Joint Board's recommendations—as well as the reasoning underlying the recommendations—without modification a few months later.²³ In doing so, the Commission highlighted the “administrative benefits” of a rule requiring certification by customers where “each of their special access lines carries *more than a de minimis amount of interstate traffic*.”²⁴

Since then, the Commission has reaffirmed that certification is required to establish the *interstate* jurisdiction of a dedicated circuit that would otherwise be *intrastate* in nature. For example, in 1995, the Commission summarized its rule regarding the jurisdiction of mixed-use private lines as follows: “a subscriber line is deemed to be interstate *if* the customer certifies that ten percent or more of the calling on that line is interstate.”²⁵

²² *Id.* at ¶ 32 (emphasis added).

²³ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660, ¶ 6 (1989) (“We therefore adopt the Joint Board's recommendation. In doing so, we also adopt the Joint Board's reasoning in support of its recommendation as our own.”).

²⁴ *Id.* at ¶ 3 (emphasis added).

²⁵ *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 4153, ¶ 17 (1994) (emphasis added).

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Three years later, when evaluating whether GTE's DSL line service should be tariffed before the Commission or at the state level, the Commission applied the 10% Rule to conclude that these services were interstate.²⁶ Critical to this conclusion was the Commission's finding that "GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate."²⁷ In other words, GTE configured the lines to carry more than a *de minimis* share of interstate traffic and intended to require corroborating certifications.

Most recently, in 2001, the Commission upheld continued use of the 10% Rule, noting that under the rule, "mixed-use lines would be treated as interstate *if* the customer certifies that more than ten percent of the traffic on those lines consists of interstate calls."²⁸

As the foregoing makes clear, the Commission has not wavered in its interpretation that a geographically intrastate private line should be considered jurisdictionally interstate only *if* the customer certifies that *more than* ten percent of the traffic on that line is interstate in nature. Since 1989, the "more than ten percent" certification has been necessary to convert what appears to be an intrastate line into an interstate line. By contrast, the Commission has never indicated that this rule (or certification thereunder) was meant to achieve the opposite—to *confirm* that a geographically intrastate line really is intrastate.

²⁶ *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, n. 95 (1998).

²⁷ *Id.*

²⁸ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Order, 16 FCC Rcd 11167, ¶ 2 (2001) (emphasis added).

IV. ARGUMENT

A. **THE COMMISSION SHOULD REVERSE USAC’S UNILATERAL DECISION TO RECLASSIFY THE VAST MAJORITY OF PRT’S PRIVATE LINE REVENUES FROM INTRASTATE TO INTERSTATE.**

PRT urges the Commission to reverse USAC’s decision to reclassify PRT’s private line revenues from intrastate to interstate for the following six reasons:

First, USAC ignores the plain meaning of the 10% Rule and the Commission’s interpretations of the Rule. As detailed below, USAC relies on the 10% Rule to support its presumption that, as a default, revenues from geographically intrastate private lines are to be treated as interstate, absent affirmative evidence to the contrary. But USAC has the presumption exactly backwards. The plain meaning of the 10% Rule—as well as Commission precedent—leave no doubt that physically intrastate private line circuits should be classified as intrastate *unless* the carrier presents evidence (such as through a certification) that more than a *de minimis* amount of traffic on the circuit is interstate.

Second, even if the 10% Rule was unclear—which it is not—Section 54.702 of the Commission’s rules would expressly prohibit USAC from “mak[ing] policy” and “interpret[ing] unclear provisions” of the the 10% Rule.²⁹

Third, even if the FCC sided with USAC’s application of the 10% Rule, neither the FCC nor USAC could retroactively apply this novel interpretation of the 10% Rule to PRT’s provision

²⁹ 47 C.F.R. § 54.702(c); *see also Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶ 16 (1998) (“Consistent with Congress’s directive that the combined entity shall not interpret rules or statute, we emphasize that USAC’s function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed.”).

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of service in 2007. Doing so would be impermissibly retroactive and violate fundamental principles of due process.³⁰

Fourth, before USAC's preferred version of the 10% Rule could become binding on PRT and other entities, the Commission would need to modify the rule through notice and comment rulemaking. Here the Commission has not undertaken—let alone completed—such a rulemaking.

Fifth, in addition to being illegal, USAC's position is simply poor public policy. As detailed below, USAC's position recreates problems that the Joint Board and the Commission sought to solve in 1989 and creates new challenges for state regulators, the industry, and consumers.

Finally, even if USAC were authorized to turn Commission precedent on its head, USAC cast aside critical evidence that confirms that the lines that PRT reported as geographically intrastate were really intrastate. Specifically, USAC ignores that PRT's customers knowingly purchased the private lines in question from the intrastate tariff even though the intrastate tariff cost three times as much as the interstate tariff. Any rationale business would have purchased their service from PRT's interstate tariff if all they needed to do was certify that more than a *de minimis* amount of traffic on the circuit would be interstate.

For these reasons, the Commission should reverse USAC's decision on this matter.

³⁰ For these same reasons, USAC could not retroactively increase PRT's contribution base in its 2008 Form 499-A to include text messaging and virtual private network revenues. Although USAC acknowledges that the FCC does not require contributions on the basis of such revenues, it cautioned PRT that USAC would increase PRT's contribution base in the 2008 Form 499-A if USAC "receiv[ed] clarification from the FCC" to classify such revenues as telecommunications revenue. Final Audit Report at 4. As detailed above, federal law would prohibit USAC from applying such an interpretation retroactively.

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1. USAC'S APPLICATION OF THE 10% RULE IN THIS CASE IS NOT SUSTAINABLE GIVEN THE PLAIN MEANING OF THE RULE, THE HISTORICAL CONTEXT FOR THE RULE, AND THE COMMISSION'S INTERPRETATION OF THE RULE.

USAC's position turns the 10% Rule on its head and erroneously shifts the presumptive jurisdiction of geographically intrastate private lines contrary to Commission precedent and the history of the rule. As explained above, if USAC's position were correct, the Joint Board's 1989 recommendation, which the Commission adopted, would be inexplicable. The goal of the Joint Board recommendation was to preserve *state* regulatory authority over physically intrastate private lines absent evidence that more than a *de minimis* amount of interstate traffic was being carried. USAC's presumption, however, assigns *federal* jurisdiction to these intrastate private lines absent evidence that only 10% or less of the traffic is interstate.³¹ Furthermore, GTE, in the tariff decision discussed earlier, to name another example, would not have needed to collect customer certifications regarding the interstate use of DSL. Instead, were USAC's application of the 10% Rule correct, the Commission would have explained, in finding GTE's DSL service jurisdictionally interstate, that the jurisdictional nature of the line, by default, is interstate and certifications would be required only if 90% or more of the traffic was *intrastate*. However, as noted above, the Commission instead underscored that GTE obtained certifications that more than 10% of the traffic was *interstate* and, on that basis, concluded that GTE's DSL product was interstate.

The 10% Rule, then, should only be read as creating a presumption that the revenues from a physically intrastate private line are to be treated as intrastate absent evidence that the

³¹ *Id.* at 11 (“[I]n order for the Carrier to ensure compliance with the Instructions, FCC Rule 36.154 and FCC orders, the Carrier must evaluate the traffic on its private lines, whether through a traffic study, customer certifications, or other means. The Joint Board’s recommendation does not permit a carrier to assume intrastate jurisdiction of its private lines.”).

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traffic carried over the line is more than 10% interstate. Indeed, and perhaps most significantly for the present appeal, this is effectively how the 2008 Form 499-A instructions reads: “*If over ten percent of the traffic carried over a private or WATS line is interstate, then the revenues and costs generated by the entire line are classified as interstate.*”³² By treating every private line circuit that *may* be configured by the customer to tie into an interstate line or service as one that *is in fact* tied into such an interstate line or service and *presuming* that more than 10% of the circuit’s traffic is interstate, without any supporting evidence, the USAC Board not only ignores how the Commission’s 10% Rule was created and has been interpreted, but also it ignores the 499-A Instructions for the year of the audit. In the absence of documented contrary evidence that physically intrastate private lines offered by PRT were being used for interstate purposes, PRT reasonably and justifiably treated revenues from such circuits as intrastate.

Even where private lines with end points in one state are configured in a manner that may allow for interstate as well as intrastate traffic, the 10% Rule is clear. Only where there is customer certification or proof that more than 10% of the traffic is interstate will the facility be considered interstate in jurisdiction. Here, such certifications by PRT’s customers for the circuits at issue are not in PRT’s possession or in evidence. But USAC has nonetheless failed to explain why, in the absence of such certifications, the private line revenues at issue should be treated as interstate.³³

³² 2008 499-A Instructions III.C.3. (emphasis added).

³³ Contrary to USAC’s apparent position, no obligation exists for private line service providers to ensure, either initially or on a continuing basis, that customers which purchase intrastate private line services actually use the services for intrastate purposes. As discussed above, the Commission could have created a presumption that the default jurisdictional treatment of private line circuits, absent a certification to the contrary, is interstate, but chose not to do so—instead creating the opposite presumption. Thus, USAC’s conclusion is completely contrary to Commission precedent.

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In short, USAC's presumption that PRT's private lines with end points within one state are presumptively interstate turns the 10% Rule on its head and would effectively turn the clock back more than twenty years and reinstate the *status quo ante* that existed prior to the Joint Board's recommendation and the Commission's Order in 1989 adopting the 10% Rule.

2. USAC EXCEEDED ITS LEGAL AUTHORITY IN INTERPRETING THE COMMISSION'S 10% RULE.

Even if the 10% Rule was unclear—which it is not—USAC has no legal authority to interpret the substance or underlining meaning of the rule. The Commission's rules clearly provide that the “*Administrator may not make policy [or] interpret unclear provisions of the statute or rules...*”³⁴ The rules further provide that “[w]here the Act or Commission's rules are unclear, or do not address a particular situation, *the Administrator shall seek guidance from the Commission.*”³⁵

The Commission has repeatedly recognized this limitation on USAC's authority.³⁶ Indeed, the FCC has *reversed* USAC decisions in cases where the agency's prior statements and rules left the industry with an “unclear understanding” of their obligations. For example, in *Intercall*, USAC determined that an audio bridging service was providing “telecommunications” services and was thus required to contribute directly to the USF. The company filed a request for review with the FCC, contending “that USAC acted outside the scope of its authority in violation

³⁴ 47 C.F.R. § 54.702(c) (emphasis added).

³⁵ *Id.* (emphasis added).

³⁶ See, e.g., *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, 22 FCC Rcd 16372, ¶ 7 (2007) (“The Administrator is prohibited from making policy, interpreting unclear provisions of the statute or the Commission's rules, or interpreting the intent of Congress, and may only advocate positions before the Commission and its staff on administrative matters.”).

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of section 54.702(c)...”³⁷ While the FCC did not expressly address the Section 54.702(c) argument, its decision is consistent with the view that 54.702(c) prohibits USAC from clarifying ambiguous FCC requirements. Specifically, the Commission observed that its own “actions (or the lack thereof) in certain Commission proceedings may have contributed to the industry’s unclear understanding of stand-alone audio bridging providers’ direct contribution obligation.”³⁸ It then purported to “make clear” for the first time that audio bridging services must contribute directly to the USF. The Commission required Intercall to contribute on a going forward basis but reversed USAC’s decision requiring Intercall to contribute based on past revenues.

In this case, the 10% Rule is clear—private line services should be treated as intrastate absent evidence that the traffic carried over the line is more than 10% interstate. But even if the 10% Rule was unclear, Section 54.702(c) leaves no doubt that USAC lacks the legal authority to apply its own interpretation of the 10% Rule when evaluating PRT’s Form 499-A. If USAC wanted to force carriers to adhere to its interpretation, its proper (and only) course would have been to file a letter with the FCC seeking guidance. And then the FCC—as detailed below—

³⁷ *In The Matter Of Request For Review By Intercall, Inc. Of Decision Of Universal Service Administrator*, 23 FCC Rcd 10731, ¶ 6 (2008).

³⁸ *Id.* at ¶ 23.

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would need to adopt the modified 10% Rule through notice and comment rulemaking.³⁹ USAC has not pursued this path.⁴⁰

3. USAC’S NOVEL APPLICATION OF THE 10% RULE TO PRT’S PROVISION OF SERVICE IN 2007 IS IMPERMISSIBLY RETROACTIVE AND VIOLATES PRT’S DUE PROCESS RIGHTS.

Even if the FCC sided with USAC’s application of the 10% Rule—which the Commission could not do without modifying the rule through notice and comment rulemaking—neither the FCC nor USAC could retroactively apply this novel interpretation of the 10% Rule to PRT’s provision of service in 2007. Doing so would be impermissibly retroactive and violate fundamental principles of due process.⁴¹

³⁹ See 47 C.F.R. § 54.702(c); see also *Request for Guidance with Respect to Sandhill Regional Library System, Rockingham, North Carolina Federal-State Joint Board on Universal Service Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 17 FCC Rcd 11878, ¶ 4 (2002) (“On May 21, 2002, the Administrator filed a letter seeking guidance from the Commission pursuant to section 54.702(c) of the Commission’s rules.”); *id.* at n.2 (“Under section 54.702(c) of the Commission’s rules, the Administrator may seek guidance from the Commission where its rules do not address a particular situation.”).

⁴⁰ Notably, Part 32 only applies to ILECs. Thus, reading a rigorous document retention requirement into Part 32 (that would apply to conduct before 2008) is arbitrary and capricious because it would create an unlawful regulatory disparity between ILECs and non-ILEC recipients of universal service support. See *Burlington N. & Sante Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

⁴¹ Further, because USAC has implemented this new interpretation in USF audits, its retroactive application would be by definition arbitrary and inequitable, applying only to carriers subjected to audits. See, e.g., *id.* (explaining that an agency cannot treat similarly situated parties/entities differently). The market for private line services is highly competitive, and a piecemeal, audit-based approach to implementing this unlawful reclassification and resulting USF assessment would mean that USAC, and not the market, determines which members of the industry are the most competitive and whether certain limited groups of private line customers are required to fund a greater portion of the federal interstate programs supported by the USF assessments.

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The APA limits “rules” to agency prescriptions of “future effect”⁴² and prohibits retroactive rules.⁴³ A rule is primarily retroactive⁴⁴ if it “impair[s] rights a party possessed when he acted, increase[s] a party’s liability for past conduct, or impose[s] new duties with respect to transactions already completed.”⁴⁵ Such rules are “categorical[ly] limit[ed],” *i.e.*, per se unlawful.⁴⁶ In addition, “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”⁴⁷

Applying a new 10% Rule to PRT’s conduct in 2007 would be plainly retroactive. Indeed, the Commission and USAC would be judging PRT’s conduct under a standard that was not in place during the period of service being audited. Specifically, applying a new version of

⁴² 5 U.S.C. § 551(4). *See also* *NCTA v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (highlighting the “APA’s requirement that legislative rules ... be given future effect only”) (internal quotation omitted).

⁴³ *See, e.g., DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (holding that “primarily retroactive” rules are per se unlawful under the APA); *Chadmoore Commc’ns, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (“[A] legislative rule may only be applied prospectively.”); *see also Bowen v. Georgetown Univ. Hosp.*, 448 U.S. 204, 216 (1988) (Scalia, J., concurring) (stating that the APA “does not permit retroactive application” of agency rules).

⁴⁴ *See, e.g., DIRECTV*, 110 F.3d at 825-26; *see also, e.g., Bergerco Canada v. U.S. Treasury Dep’t*, 129 F.3d 189, 192 (D.C. Cir. 1997) (“[T]here are two retroactivity limits in the APA: The first is a categorical limit, requiring express congressional authority and applying only in the domain of agency rules. The second limit is more elastic, governing all agency decision-making and involving the sort of balancing of competing values, both legal and economic, that often features in ‘arbitrary or capricious’ analysis and that has historically governed retroactivity considerations in the agency context.”).

⁴⁵ *DIRECTV*, 110 F.3d at 825-26 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

⁴⁶ *Bergerco Canada v. U.S. Treasury Dep’t*, 129 F.3d 189, 192 (D.C. Cir. 1997).

⁴⁷ *See, e.g., Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

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the 10% rule to PRT's 2007 conduct "impose[s] new duties with respect to transactions already completed,"⁴⁸ making it retroactive and thus unlawful. In addition, there could be no debate about whether PRT received "fair notice" that the modified 10% Rule would apply to its 2007 conduct⁴⁹ because PRT literally had *no* notice. In sum, applying a modified 10% Rule to PRT's earlier conduct would be blatantly retroactive and a denial of due process.⁵⁰

4. A MODIFIED 10% RULE COULD HAVE ONLY BEEN ADOPTED THROUGH NOTICE AND COMMENT RULEMAKING.

USAC concluded that PRT needed to perform traffic studies or obtain other evidence that the actual traffic on each private line is intrastate in order for PRT to report the revenue as intrastate. In short, USAC adopts a presumption that private line traffic is interstate. The rule that USAC appears to be applying can be stated as follows:

*If any of the traffic carried over a private line may be interstate, then the revenues and costs generated by the entire line are classified as interstate, unless the carrier has a complete understanding of each of the customer's network topology and design and that understanding allows the carrier to treat 90% or more of the traffic as intrastate.*⁵¹

Of course, USAC is not permitted to write its own substantive rules or modify existing rules.

Neither is the Commission, unless it provides notice and an opportunity to comment. Indeed,

⁴⁸ *DIRECTV*, 110 F.3d at 826.

⁴⁹ *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (holding that "due process requires that parties receive fair notice before being deprived of property," and applying that requirement to a denial of a renewal application for a Commission license).

⁵⁰ If the Commission adopted a new 10% Rule, USAC would need to apply the rule on a forward-looking basis. *See, e.g., Retail, Wholesale & Dep't Store Union*, 466 F.2d 380, 390 (DC Cir. 1980); *see also Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, ¶ 24 (2008) (finding that prospective application of a decision requiring USF contribution was appropriate "because of the lack of clarity" in prior decisions and industry practice).

⁵¹ XO articulated this "rule" in its Request for Review of a USAC decision in which USAC misinterpreted the 10% Rule. *See XO Request for Review* at 14-15.

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any modification of the Commission's rules that does not comply with the notice and comment rulemaking requirements of the APA would be illegal.⁵² Yet this is exactly what USAC has done in its audit findings. USAC's adoption of a presumption that revenues from private line services are to be treated as interstate is the inverse of the existing 10% Rule. But this modification of the 10% Rule could only have been accomplished through notice and comment rulemaking (and only by the FCC).

5. USAC'S POSITION RECREATES THE PROBLEM THAT THE COMMISSION SOUGHT TO SOLVE IN 1989 AND CREATES NEW CHALLENGES FOR STATE REGULATORS AND THE TELECOMMUNICATIONS INDUSTRY.

Under the "modified" 10% Rule that USAC is now following, states would be forced to cede regulatory authority over all private lines for which certification is not provided that are nevertheless sold within their boundaries. This would, in turn, result in a dramatic decrease in the reporting of—and regulatory payments for—intrastate revenues associated with these private lines.

The implications from a historical perspective could be even more severe: carriers that have reasonably relied for years on a "more than ten percent interstate" certification could face the prospect of having many (if not all) of their intrastate private lines suddenly reclassified retroactively as interstate and subject to USF contribution assessments.⁵³ Such a finding would have ripple effects throughout the telecommunications industry. For example, if PRT were liable for USF contribution for years past because such private lines are now deemed interstate, it

⁵² 5 U.S.C. §§ 552(a), 553.

⁵³ USAC's approach also presents private line providers like PRT with a precarious Hobson's Choice: the carrier can follow Commission precedent and report traffic as state commissions and this Commission would expect, and potentially be liable for excess USF contributions, or the carrier can follow USAC's approach and be subject to penalties from state commissions for under-reporting intrastate revenue.

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would be entitled to refunds from state authorities for prior state universal service contributions and other state regulatory fees and surcharges paid with respect to the affected private lines (since the revenues from those lines turned out not to be intrastate after all). Thus, not only would USAC's position usurp jurisdiction over services that have been subject to state regulatory authority for at least two decades, but it could also result in significant sums being transferred—both retroactively and on a going-forward basis—from state to federal coffers at a time when states can least afford the loss of those funds.

6. EVEN IF USAC WERE PERMITTED TO TURN COMMISSION PRECEDENT ON ITS HEAD, USAC FAILED TO CONSIDER EVIDENCE THAT SHOWS THAT THE LINES THAT PRT REPORTED AS GEOGRAPHICALLY INTRASTATE WERE ACTUALLY INTRASTATE.

Assuming, for the sake of argument, the applicability of USAC's position regarding private line certification, PRT provided evidence to USAC that demonstrates that the lines that PRT reported as geographically intrastate were really intrastate. Specifically, PRT informed USAC that its customers knowingly purchased the private lines in question from PRT's intrastate tariff even though—as the chart below and as Attachments C and D show—the intrastate tariff was often three times more expensive than the interstate tariff.

	Local Tariff: Section 7.6			Tariff FCC #1: Section 17.3		
	Channel Term: Per Term	Channel Mileage Term^a: Per Term	Channel Mileage Facility: Per mile	Channel Term: Per Term	Channel Mileage Term^a: Per Term	Channel Mileage Facility: Per mile
2Wire/VG	\$41.29	\$29.56	\$2.94	\$8.28	\$3.68	\$0.92
DS1	\$176.82	\$94.38	\$19.14	\$44.16	\$36.80	\$9.20
DS3	\$2,051.19	\$525.64	\$131.77	\$779.59	\$257.63	\$74.14

^a Two CMTs are required for each complete circuit

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Any rationale business would have purchased their private lines from PRT's interstate tariff if all they needed to do was certify that more than a *de minimis* amount of traffic on the circuit would be interstate.⁵⁴

B. USAC'S PAY AND DISPUTE POLICY IS UNLAWFUL.

USAC's audit letter demands that PRT file a revised Form 499-A and [REDACTED] while it disputes the lawfulness of USAC's audit. Although USAC applies this "pay-and-dispute" policy as if it were a Commission rule, the Commission has never adopted that policy, let alone codified the policy as a rule. USAC's pay-and-dispute policy is unlawful and cannot be enforced against PRT here for several reasons.

Foremost, USAC lacked authority under FCC rules to adopt the policy in the first place. Even if USAC had the authority to adopt pay-and-dispute, the policy is nevertheless unlawful because it is a substantive rule that was not adopted pursuant to the notice-and-comment requirements of the APA. Further still, USAC cannot impose penalties pursuant to the pay-and-dispute policy without violating PRT's Due Process rights because the policy was inadequately noticed.

To avoid this significant legal uncertainty, the Commission should exercise its discretion to stay USAC's pay-and-dispute policy pending the outcome of Commission action in WC Docket No. 06-122 & GN Docket No. 09-51⁵⁵ and appeals by Level 3 and Ascent Media.⁵⁶ In

⁵⁴ What USAC seems to be saying is that PRT must become expert not in the services it provided but in all aspects of the customers' use of such services by each of its many business customers. This raises too high a bar for providers of telecommunications.

⁵⁵ *Universal Service Contribution Methodology A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 2012 WL 1524623, ¶ 360 (2012) ("FNPRM").

⁵⁶ See, e.g., Ascent Media Group Petition for Reconsideration in the Matter of Universal Service Contribution Methodology Request for Waiver of Decisions of the Universal Service
Footnote continues on next page . . .

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the pending *FNPRM*, the Commission has proposed to codify pay-and-dispute as a Commission rule. Until the policy is codified as a Commission rule, the Commission should exercise its discretion as a matter of equity and fairness to suspend the pay-and-dispute policy. Moreover, the pending appeals by Level 3 and Ascent Media could determine the lawfulness of USAC's enforcement of the pay-and-dispute policy. A stay would fairly allow PRT to pursue its appeals before the Commission free from the threat of hundreds of thousands of dollars of penalties and interest if this appeal is unsuccessful. PRT's request for a stay is being filed separately with the Commission.

1. USAC'S ADOPTION OF THE PAY-AND-DISPUTE POLICY WAS *ULTRA VIRES*.

USAC applies an internal pay-and-dispute policy that requires carriers to pay disputed invoices even while a dispute and appeal is pending.⁵⁷ As a result, while waiting for USAC to issue a refund or the Bureau to act on appeal, carriers face an unreasonable choice, either: (1) pay billed contributions that are inequitably higher than the amount due under Commission rules; or (2) incur interest and penalties which can be significant. The policy inflicts harm on carriers that make mistakes because, as even USAC admits, refunds can take up to 18 months to be processed and issued.

Administrator by Achieve Telecom Network of Massachusetts, LLC, et al., WC Docket No. 06-122 (filed Jan. 14, 2009); Application for Review of Level 3 Communications, LLC, ICG Telecom Group, Inc., Looking Glass Networks, Inc., Looking Glass Networks of Virginia, Inc., Progress Telecom, LLC, and WilTel Communications, LLC, WC Docket No. 06-122 (filed Mar. 1, 2010).

⁵⁷ See Universal Service Administrative Company, "Paying USAC Bill during Appeal Process," available at <http://www.usac.org/fund-administration/contributors/file-appeal>.

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Pay-and-dispute is a policy created by USAC alone. The Commission has not adopted it through a rulemaking subject to legally required notice and comment,⁵⁸ although the Commission has now proposed to do so. Whenever the Commission or a Bureau has referred to pay-and-dispute, it has been characterized as a “USAC principle” or “USAC policy.”⁵⁹

The USAC Administrator’s authority is extremely limited under the Commission’s rules. Section 254 of the Communications Act directs the Commission to implement policies governing the universal service program.⁶⁰ While the FCC has acknowledged the existence of USAC’s policy, it has not adopted it as a binding regulation. As noted above, under the Commission’s rules, “[t]he Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”⁶¹

⁵⁸ See, e.g., 5 U.S.C. § 553.

⁵⁹ *Request For Review by InterCall, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd 10731, n.17 (June 30, 2008) (“general USAC principle of ‘pay and dispute’”); *Federal-State Joint Board on Universal Service, Universal Service Contribution Methodology, Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, Order, 23 FCC Rcd 10096, ¶ 5, n.16 (June 26, 2008) (“USAC’s ‘pay and dispute’ policy”); *Federal-State Joint Board on Universal Service Request for Review by WorldxChange Corp. of Action by Universal Service Administrator*, Order, 22 FCC Rcd 5082, Appendix A, (March 16, 2007) (USAC maintains a ‘pay and dispute’ policy”); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau to Scott Barash, Universal Service Administrative Company, DA 08-602, 23 FCC Rcd 4705 (March 24, 2008) (“USAC’s general ‘pay and dispute’ policy”); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau to Scott Barash, Universal Service Administrative Company, DA 08-1447, 23 FCC Rcd 9571 (June 19, 2008) (“USAC’s general ‘pay and dispute’ policy”).

⁶⁰ 47 U.S.C. § 254.

⁶¹ 47 C.F.R. § 54.702(c).

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The Administrator clearly exceeded this limited authority by adopting the pay-and-dispute policy. The Administrator has no authority to “make policy.” Even if it did, the Administrator could not exercise such policy-making authority to essentially fill the gaps in “unclear provisions” of the Commission’s rules. Yet that is precisely what the Administrator did in adopting the pay-and-dispute policy as a gap-filling measure. Instead of usurping the Commission’s authority for its own, the Administrator should have followed FCC rules requiring it to “seek guidance from the Commission.” Accordingly, PRT is not required to comply with this *ultra vires* USAC policy.

2. ENFORCEMENT OF USAC’S PAY-AND-DISPUTE POLICY VIOLATES THE NOTICE-AND-COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

Even assuming USAC had authority to adopt pay-and-dispute, the policy is unlawful because it is a substantive rule never adopted pursuant to the notice-and-comment requirements of the APA. As discussed above, substantive rules must be adopted by the Commission after notice and an opportunity for public comment.⁶² The pay-and-dispute policy is a substantive rule because it “carries the force and effect of law”⁶³—penalizing carriers for failing to comply with USAC’s demand for payment while appeals are pending. USAC’s pay-and-dispute policy was not the subject of a notice-and-comment rulemaking.

Despite these APA deficiencies, USAC enforces the pay-and-dispute policy as if it were an official FCC rule adopted after notice and comment. USAC attempts to use the Form 499-A instructions and true-up process to justify treating its pay-and-dispute and form revision processing guidelines as Commission rules. But USAC cannot point to anything in the

⁶² 5 U.S.C. § 553(c).

⁶³ *Air Transport Ass’n of Am., Inc. v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002).

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Commission's true-up rules that adopts USAC's pay-and-dispute or form revision processing guidelines. To the contrary, the Commission has acknowledged the pay-and-dispute policy but has never mandated compliance.

The FCC's pending *FNPRM* effectively concedes that the pay-and-dispute policy is a substantive rule that must be adopted after notice and comment. In the *FNPRM*, the Commission proposes to codify pay-and-dispute as a Commission rule. Codification would be unnecessary if USAC could bypass the APA's notice-and-comment requirements and lawfully enforce the pay-and-dispute policy.

Even if the Commission codifies pay-and-dispute as a rule in a subsequent order, USAC cannot apply the codified rule to PRT's conduct in this case. The Commission must apply its rules prospectively, and USAC cannot apply the Commission's rules to PRT without violating the APA's prohibition on retroactive rulemaking.⁶⁴

3. ENFORCEMENT OF USAC'S PAY-AND-DISPUTE POLICY VIOLATES BASIC NOTIONS OF DUE PROCESS.

USAC cannot impose penalties pursuant to the pay-and-dispute policy for the further reason that it would violate PRT's due process rights. As noted above, and as the Supreme Court recently explained in *FCC v. Fox Television Stations, Inc.*, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."⁶⁵ Indeed, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule

⁶⁴ *DIRECTV, Inc.*, 110 F.3d at 825-26; *Bergerco*, 129 F.3d at 192.

⁶⁵ No. 10-1293, Slip Op. 11 (June 21, 2012).

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without first providing adequate notice of the substance of the rule.”⁶⁶ “A . . . punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁶⁷

Even if USAC could adopt new policies—which it cannot—USAC has not provided sufficient notice of the pay-and-dispute policy. There is no statute or regulation whatsoever that provides notice of the policy. Instead, USAC apparently deemed it sufficient to simply publicize the policy on its website. But an “isolated and ambiguous statement [on a government website] does not suffice for the fair notice required when the Government intends to impose over a \$[7] million fine. . . .”⁶⁸ Accordingly, neither USAC nor the Commission can lawfully sanction PRT for failing to comply with a policy that was inadequately noticed.

⁶⁶ *Satellite Broad.*, 824 F.2d at 3; *see also General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (“Due process requires that parties receive fair notice before being deprived of property.”).

⁶⁷ *Fox*, Slip Op. 12.

⁶⁸ *Id.* at 15.

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V. CONCLUSION

For the foregoing reasons, the Commission should reverse the decisions of USAC discussed above.

Respectfully submitted,

/s/ Walter Arroyo

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June 25, 2012

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APPENDIX A – AUDIT REPORT

[33 pages]

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**APPENDIX B – CORRESPONDENCE BETWEEN PRT AND
USAC**

[5 pages]

REDACTED –FOR PUBLIC INSPECTION

APPENDIX C – PRT INTRASTATE TARIFF

[17 pages]

REDACTED –FOR PUBLIC INSPECTION

APPENDIX D – PRT INTERSTATE TARIFF

[60 pages]

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2012, I caused copies of the foregoing Request for Review By Puerto Rico Telephone Company Inc. of the Decision of the Universal Service Administrator to be served upon the following party by first-class mail:

Universal Service Administrative Company
Attention: David Capozzi, Acting General Counsel
2000 L Street, N.W., Suite 200
Washington, DC 20036

/s/ Steven Merlis
Steven Merlis

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review by Puerto Rico)	WC Docket No. 08-71
Telephone Company, Inc. of Decision of)	
the Universal Service Administrator)	WC Docket No. 06-122
)	
)	USAC Audit No. CR2009CP002
)	

**AFFIDAVIT OF ANA MARIA BETANCOURT DE DE LA MOTA IN SUPPORT
OF REQUEST FOR REVIEW BY PUERTO RICO TELEPHONE COMPANY,
INC.**

I, Ana María Betancourt de De La Mota, do hereby declare under penalty of perjury the following:

1. I am the Administration and Finance General Director for Puerto Rico Telephone Company, Inc.
2. I have read the foregoing Request for Review of Puerto Rico Telephone Company of the Decision of the Universal Service Administrator that will be filed on June 25, 2012, and any facts stated therein are true and correct to the best of my knowledge, information, and belief.

Date: June 25, 2012

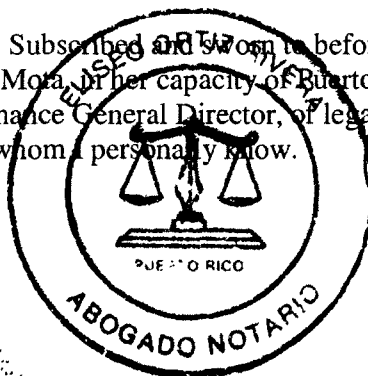
Signature: _____

Ana María Betancourt de De La Mota
Puerto Rico Telephone Company, Inc.

Affidavit No. _____

6560

Subscribed and sworn to before me this 25th day of June, 2012, by Ana María de De La Mota, in her capacity of Puerto Rico Telephone Company, Inc.'s Administration and Finance General Director, of legal age, married and resident of Guaynabo, Puerto Rico, whom I personally know.



NOTARY PUBLIC